

EXHIBIT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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PRESTON JONES and SHIRIN)
DELALAT, on behalf of)
themselves, all others)
similarly situated, and the)
general public,)
Plaintiffs,)
vs.)
NUTIVA, Inc.)
Defendants.)
_____)

Case No: 3-16-CV-00711-HSG

VIDEO-DEPOSITION OF J. MICHAEL DENNIS
Redwood City, California
Tuesday, August 29, 2017

Reported by:
LISA R. TOW
CSR No. 6629
Job No. 2684048

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1 And are you referring -- when you use the term 09:26:42AM
2 "price premium" are you using the same definition 09:26:45AM
3 as Mr. Weir? Which is consumers would receive the 09:26:47AM
4 value of the price premium they paid solely as a 09:26:50AM
5 result of defendant's conduct of labeling their 09:26:53AM
6 products with the claims? 09:26:56AM
7 A. Yes, I do. 09:26:58AM
8 Q. And so when we use the term "price 09:26:58AM
9 premium," are we talking about the delta between 09:27:07AM
10 what the consumer paid and what the product was 09:27:11AM
11 actually worth at the time of the purchase? 09:27:14AM
12 A. Well, it's the difference between what 09:27:17AM
13 they paid versus how much value that the consumers 09:27:21AM
14 placed on that product, having the challenged label 09:27:25AM
15 or labels. 09:27:28AM
16 Q. So, we have the amount the consumer 09:27:29AM
17 paid, which is just a historical figure; correct? 09:27:36AM
18 A. That's correct. 09:27:40AM
19 Q. And then to find a premium, the premium 09:27:40AM
20 is going to be the difference between the amount 09:27:44AM
21 the consumer paid and what? What's the other part 09:27:46AM
22 of that equation besides the amount that was paid? 09:27:52AM
23 A. The value that the consumers placed on 09:27:55AM
24 the product without the challenged label or labels. 09:27:58AM
25 Q. And so your conjoint -- actually, let me 09:28:01AM

1 saying that this is the value. That the consumer's 09:49:56AM
2 place and hold for that product without the 09:50:00AM
3 challenge claim. 09:50:02AM
4 Q. Okay. So, if, going back to just we'll 09:50:04AM
5 say 2015, a 15 ounce jar of Nutiva Coconut Oil. 09:50:10AM
6 Let's assume that the consumer actually paid \$15 09:50:15AM
7 for it. That was the price \$15. 09:50:19AM
8 And let's assume that you determined that for 09:50:22AM
9 a particular challenge claim, there was a 10 09:50:25AM
10 percent premium. Then is the actual value of what 09:50:28AM
11 the consumer received at the time of that 09:50:31AM
12 transaction, since there was a challenge claim 10 09:50:34AM
13 percent premium, is it your testimony, the actual 09:50:37AM
14 value of the product the consumer received was 10 09:50:40AM
15 percent less than \$15? 09:50:42AM
16 A. We might be saying the same thing. My 09:50:47AM
17 survey is measuring the value that consumers place 09:50:49AM
18 on this product without the challenged claim. So 09:50:53AM
19 to use the year 2015, this is exactly what my 09:50:56AM
20 survey is saying, that my price premium statistics 09:51:00AM
21 indicate that, if you can look the my table there 09:51:05AM
22 is a percentage reduction in value that occurs as a 09:51:09AM
23 result of consumers putting value on these claims. 09:51:12AM
24 Q. And you're only measuring, we discussed 09:51:18AM
25 earlier, that the survey is only measuring consumer 09:51:23AM

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1 preferences; right? 09:51:27AM

2 A. It takes into account a lot of factors 09:51:28AM

3 beyond consumer preferences. But, the study, 09:51:31AM

4 itself, is measuring the consumer preferences and 09:51:33AM

5 how that translates into the value they place on 09:51:37AM

6 these claims. 09:51:40AM

7 Q. Right. Translates into the value the 09:51:41AM

8 consumer preference of claims; right? 09:51:44AM

9 A. It's a consumer survey, so all my 09:51:45AM

10 respondents are consumers. 09:51:48AM

11 Q. You didn't survey the suppliers, for 09:51:48AM

12 example? 09:51:50AM

13 A. I have not been asked to do an 09:51:51AM

14 establishment survey of that type, so... 09:51:53AM

15 Q. And would you agree that the price of a 09:51:55AM

16 good -- the actual market price of a good, is 09:51:59AM

17 established by there being a willing seller and 09:52:03AM

18 willing buyer at that particular price? 09:52:06AM

19 A. Well, that is how market transactions 09:52:08AM

20 work. There is a buyer and there is a seller. 09:52:11AM

21 Q. And so a consumer's evaluation is 09:52:13AM

22 one-half of the equation or I won't put a figure on 09:52:16AM

23 it. 09:52:19AM

24 A consumer's evaluation is part of the 09:52:20AM

25 equation for what establishes a market price; 09:52:23AM

1 correct? 09:52:26AM

2 A. It's an intricate part, of course, about 09:52:26AM

3 consumers willing to spend. That's why the 09:52:30AM

4 government, for example, looks at consumer 09:52:33AM

5 confidence and uses that as a very important 09:52:36AM

6 variable in economic forecasts in our country. 09:52:38AM

7 Q. Recognizing its important variable, is 09:52:41AM

8 the seller also an important variable in setting a 09:52:45AM

9 market price? 09:52:48AM

10 A. It is. 09:52:49AM

11 Q. And your survey does not measure 09:52:49AM

12 anything to do with the seller variable with Nutiva 09:52:52AM

13 Coconut Oil; does it? 09:52:57AM

14 A. It incorporates seller considerations. 09:52:57AM

15 And I think by proxy, the transaction data that I 09:52:59AM

16 use as the basis for my design of the conjoint 09:53:03AM

17 survey and the analysis. 09:53:07AM

18 I think through that mechanism I'm taking 09:53:08AM

19 into account what the seller is willing to actually 09:53:12AM

20 sell this product for. 09:53:16AM

21 Q. Are you talking about the price 09:53:17AM

22 attribute used in the survey? 09:53:21AM

23 A. I'm talking about two things really. 09:53:22AM

24 The price attribute and also the price points I 09:53:25AM

25 used in my analysis. 09:53:27AM

1 what the sellers might or might not do with their 10:07:13AM
2 pricing. 10:07:16AM
3 I actually base it on what they did. 10:07:16AM
4 Q. Right. But, what the sellers might or 10:07:19AM
5 might not have done could have affected the market 10:07:22AM
6 price; correct? In the real world? 10:07:26AM
7 A. My survey is about the real world. It's 10:07:28AM
8 impossible for -- and it's actually besides the 10:07:32AM
9 point. 10:07:35AM
10 You know, my assignment is to measure these 10:07:35AM
11 valuations that consumers place on the claims. Not 10:07:39AM
12 to try to figure out all the possible scenarios 10:07:42AM
13 about how businesses might react to the challenge 10:07:46AM
14 if not being able to use these labels anymore. 10:07:49AM
15 Q. The reason I'm asking the question, sir, 10:07:52AM
16 is because your assignment was to measure the 10:07:54AM
17 valuations the consumer placed on claims. And I'm 10:07:55AM
18 trying to figure out how that valuation turns into 10:07:58AM
19 actual differences in market value of a product. 10:08:01AM
20 Okay? 10:08:05AM
21 And I am trying to figure out if you believe 10:08:05AM
22 -- let me ask you this way. 10:08:07AM
23 Do you believe that the only thing that 10:08:08AM
24 determines the value of a product in a marketplace 10:08:10AM
25 is the value the consumer puts on it? 10:08:14AM

1 A. Could you repeat the question or ask the 10:08:17AM
2 court reporter to play it back. 10:08:22AM
3 Q. I can try to repeat it. 10:08:23AM
4 Do you believe that the only thing that 10:08:25AM
5 determines the market value of the property is the 10:08:27AM
6 value that a consumer places upon it? 10:08:30AM
7 A. No. I think -- my opinion would be that 10:08:33AM
8 supply side consideration, seller considerations, 10:08:38AM
9 take gold. Take lead, any kind of mineral. The 10:08:43AM
10 availability of titanium to make things. There are 10:08:47AM
11 any number of factors besides what consumers are 10:08:51AM
12 willing to spend money on that determines the 10:08:54AM
13 price. 10:08:56AM
14 Consumers, as we've established, is an 10:08:59AM
15 important part of that puzzle. 10:09:02AM
16 Q. And understanding that this was not part 10:09:03AM
17 of your assignment, I just want to clarify whether 10:09:06AM
18 you did it? Whether it was part of your assignment 10:09:08AM
19 or not? 10:09:11AM
20 A. I did. 10:09:13AM
21 Q. You did not attempt to determine how 10:09:15AM
22 much a seller would have valued the product or the 10:09:19AM
23 price that the seller would have put on the 10:09:22AM
24 product, if it sold the same product within the 10:09:25AM
25 class period without the challenge claims; correct? 10:09:29AM

1 challenge claims renders your conjoint survey 10:13:08AM
2 unreliable? 10:13:11AM
3 MR. FITZGERALD: Objection. Incomplete 10:13:12AM
4 hypothetical. Asked and answered. 10:13:14AM
5 THE WITNESS: No, I would not agree with 10:13:17AM
6 that. 10:13:18AM
7 MR. COLE: 10:13:19AM
8 Q. In your opinion -- what would the Court 10:13:19AM
9 in your view -- or what should the Court consider 10:13:22AM
10 more reliable? Actual transactions where consumers 10:13:26AM
11 are buying the coconut oil without the challenge 10:13:30AM
12 claims and the prices they're actually paying or 10:13:31AM
13 the price premiums established by your report? 10:13:34AM
14 A. I stand by my report. It measured at 10:13:36AM
15 that point in time. And projecting back to the 10:13:39AM
16 class period, how much value the consumers placed 10:13:43AM
17 on these results. 10:13:47AM
18 Q. Did you testify earlier to the effect 10:13:48AM
19 that in looking forward to what consumers are 10:13:51AM
20 paying now, for example, for coconut oil, assume 10:13:54AM
21 for the product without the challenge claims, that 10:13:58AM
22 you testified that you would want to know how the 10:14:00AM
23 seller adapted to that new environment in the way 10:14:04AM
24 they labeled the product or marketed the product. 10:14:09AM
25 That was your testimony? 10:14:13AM

1 motion for class certification. 11:11:15AM

2 (Exhibit Number 515 was marked for 11:11:15AM

3 identification.) 11:11:15AM

4 MR. COLE: 11:11:15AM

5 Q. And what I want to ask you, Dr. Dennis, 11:11:17AM

6 is in the conjoint survey, were the survey-takers 11:11:22AM

7 ever allowed to see the Nutiva coconut label in its 11:11:27AM

8 entirety? 11:11:32AM

9 A. No. My survey speaks for itself. I did 11:11:33AM

10 not show the entire label. I didn't feel it was 11:11:37AM

11 necessary to show the entire label. 11:11:39AM

12 Q. And so while this is just one particular 11:11:39AM

13 label from a certain period of time. Rather than 11:11:41AM

14 going through all the labels over time, maybe we 11:11:43AM

15 can shortcut it. 11:11:45AM

16 You didn't show in the survey, you didn't 11:11:46AM

17 show the survey-takers any Nutiva labels in their 11:11:49AM

18 entirety; correct? 11:11:53AM

19 A. No, I did not do that and did not see a 11:11:54AM

20 need to do that. 11:11:58AM

21 Q. And let's talk about the -- let's start 11:11:59AM

22 talking about some of the challenged claims. 11:12:05AM

23 Let's talk about 0 trans fats and we can use 11:12:07AM

24 this exhibit in front of you, 515 to work on that. 11:12:10AM

25 If we look at 515 on the first page of 515, 11:12:17AM

1 Q. So, I'm translating now over to zero 11:27:25AM
2 trans fats, spelled out, and in that case there was 11:27:28AM
3 no attribute level that allowed them to see zero 11:27:31AM
4 trans fat, spelled out, plus the disclosure 11:27:35AM
5 statement, for example? 11:27:38AM

6 A. That's true. However, I think it should 11:27:40AM
7 be pointed out that in the information provision 11:27:42AM
8 screens, there is the list of all the claims 11:27:46AM
9 presented to the respondents and in that case zero 11:27:48AM
10 trans fat, with zero spelled out, on that screen, 11:27:52AM
11 respondents did have the option to hover over the 11:27:55AM
12 what you call the "disclosure statement" and 11:27:58AM
13 thereby be able to view the nutrition facts. 11:28:01AM

14 So that was a capability for all of the 11:28:06AM
15 respondents in the survey prior to their actually 11:28:11AM
16 getting to the choice questions. 11:28:15AM

17 Q. But they couldn't do that when they were 11:28:17AM
18 actually answering the choice questions; correct? 11:28:19AM

19 A. In the context, once they got to the 11:28:22AM
20 choice questions, then the disclosure statement 11:28:25AM
21 appeared only when the 0 g, with a numeric zero, 11:28:28AM
22 trans fat being presented as a level. 11:28:33AM

23 Q. And since conjoint analysis relies on 11:28:35AM
24 consumers being able to choose between a product 11:28:39AM
25 with the attribute and a product without the 11:28:42AM

1 attribute, there was not the choice in this survey 11:28:46AM
2 for a consumer to see zero trans fat, spelled out, 11:28:49AM
3 with it, the ability to see the nutrition facts at 11:28:54AM
4 the time the consumer was making the choices; 11:28:58AM
5 correct? 11:29:01AM
6 A. I believe we're on the same page. When 11:29:03AM
7 zero trans fat, spelled out with alpha characters, 11:29:06AM
8 and that's in the choice questions, then the 11:29:09AM
9 respondents did not have the ability to see the 11:29:11AM
10 disclosure statement, which means of course they 11:29:15AM
11 could not see the nutrition facts. 11:29:18AM
12 Q. And that means, doesn't it, that at 11:29:20AM
13 least as currently designed, setting aside what may 11:29:22AM
14 or may not be done in the future, but as currently 11:29:26AM
15 designed, you cannot generate a price premium for 11:29:28AM
16 somebody who is zero trans fat, spelled out, zero 11:29:35AM
17 trans fats, spelled out, and nutrition facts box at 11:29:40AM
18 the same time; correct? 11:29:45AM
19 A. Yeah, I did not test that scenario. 11:29:45AM
20 Where the respondents had both those pieces. So 11:29:49AM
21 what I did measure was the consumers' value that 11:29:52AM
22 they placed on the zero, of course all spelled out 11:29:55AM
23 version of zero trans fat, in isolation. So what 11:29:59AM
24 was their reaction to that claim. 11:30:02AM
25 Just like all the other claims with the 11:30:04AM

1 exception of 0 g trans fat, where it's a numeric 11:30:07AM
2 zero. That's the only one where I provided the 11:30:12AM
3 nutrition facts. 11:30:16AM
4 Q. And so -- okay, we'll get that -- short 11:30:16AM
5 circuits a lot then, so I don't have to go through 11:30:19AM
6 the same line of questioning for all the other 11:30:20AM
7 challenged claims. 11:30:22AM
8 We set aside 0 g trans fat, with zero as a 11:30:23AM
9 numeral, setting that one aside, with all the other 11:30:27AM
10 challenged claims, you did not show as a choice to 11:30:28AM
11 consumers in the survey the challenged claim with 11:30:32AM
12 the disclosure of the nutrition facts box; correct? 11:30:37AM
13 A. That's right. I was measuring the value 11:30:42AM
14 that the consumers placed on these other claims. 11:30:45AM
15 Actually, all these claims in my conjoint, yeah. 11:30:48AM
16 Q. So you're measuring the value placed on 11:30:51AM
17 the claim in isolation, not the claim with the 11:30:54AM
18 nutrition facts box information; correct. 11:31:00AM
19 A. With the exception of the 0 g, written 11:31:04AM
20 in numeric, that's where I do provide the nutrition 11:31:05AM
21 facts. 11:31:06AM
22 Q. And you did not allow in your design the 11:31:07AM
23 0 g trans fat, where zero is a numeral, to show up 11:31:17AM
24 in the same choice set as the zero where it's 11:31:20AM
25 spelled out; correct? 11:31:23AM

1 those claims on the same option. 11:32:41AM

2 Q. Looking as Exhibit 515 on the label, 11:32:45AM

3 understanding what you just said, looking at 11:32:47AM

4 Exhibit 515 on the label, any consumer who 11:32:50AM

5 purchased that product with that label, the 11:32:53AM

6 15 ounce product is the one on the first page on 11:32:58AM

7 515. Assuming the consumer read the nutrition 11:33:01AM

8 facts box, they would be look at a product with 11:33:09AM

9 trans fat 0g and zero trans fats on the same level; 11:33:11AM

10 correct? 11:33:13AM

11 MR. FITZGERALD: Objection. The documents 11:33:14AM

12 speaks for itself. 11:33:15AM

13 THE WITNESS: I mean they would see the trans 11:33:17AM

14 fact 0 g within the nutrition facts. 11:33:19AM

15 MR. COLE: 11:33:22AM

16 Q. And you would agree that it's possible 11:33:22AM

17 that the value a consumer might assign to -- start 11:33:24AM

18 over. 11:33:30AM

19 You agree that the value consumers might 11:33:30AM

20 assign to zero trans fact, spelled out, in the 11:33:32AM

21 conjoint survey, could vary based on whether or not 11:33:36AM

22 the consumer was also aware that the product had 11:33:40AM

23 the attribute trans fat 0g? 11:33:43AM

24 A. In the nutrition facts part you're 11:33:46AM

25 talking about? 11:33:54AM

1 Q. Yes. 11:33:54AM

2 A. It's possible. It's possible. That's a 11:33:54AM

3 scenario that could be tested in a conjoint survey. 11:33:56AM

4 Q. Is conjoint analysis ever, in your 11:34:00AM

5 experience, used by companies to determine the 11:34:13AM

6 different value associated with a product attribute 11:34:15AM

7 based on where on the label that attribute is 11:34:19AM

8 advertised? 11:34:22AM

9 A. Based on where it's actually placed on 11:34:23AM

10 the label? 11:34:27AM

11 Q. Yes. 11:34:29AM

12 A. I mean conjoint is a big field. Would 11:34:30AM

13 not surprise me if some companies do that. 11:34:32AM

14 Q. And in your experience can the way in 11:34:35AM

15 which a claim is advertised effect the impression 11:34:37AM

16 it has on consumers? 11:34:40AM

17 A. I think that it's a common sense 11:34:42AM

18 statement that product placement could have an 11:34:45AM

19 impact. 11:34:48AM

20 Q. And so I am not asking you to opine on 11:34:48AM

21 any particular challenge claim in this case, but, 11:34:54AM

22 in general, the location of a claim on a label, 11:34:57AM

23 whether it's on the front prominently or buried in 11:35:00AM

24 the back, for example, could impact the value that 11:35:03AM

25 a consumer places on that? 11:35:07AM

1 A. Or not. My assignment was to measure 11:35:09AM
2 these particular claims and what value the 11:35:15AM
3 consumers placed on them. Irrespective of whether 11:35:17AM
4 they're in big font, small font or fine print. 11:35:21AM
5 The fact is Nutiva put these claims on their 11:35:25AM
6 products. So, I worked from the assumptions that a 11:35:28AM
7 reasonable consumer would have, potentially, read 11:35:32AM
8 these claims, whether it's small font, you know 11:35:37AM
9 right by the Nutiva logo or in nutrition facts. 11:35:40AM
10 Q. And so working on that assumption that a 11:35:44AM
11 reasonable consumer would have potentially read the 11:35:48AM
12 claims, is the assumption that the consumer would 11:35:50AM
13 have read the other parts of the label as well or 11:35:53AM
14 just the claims? 11:35:55AM
15 A. Well, my survey is my survey. I'm only 11:35:56AM
16 measuring what I'm showing the respondents, plus 11:36:02AM
17 the assumptions that I have asked the respondents 11:36:04AM
18 to make, I'm sure we'll talk about today. 11:36:07AM
19 So my survey is measuring the valuations 11:36:10AM
20 based on the stimuli I presented to the respondent. 11:36:13AM
21 I am not making any assumptions about their having 11:36:17AM
22 read and memorized these labels before. 11:36:21AM
23 I will say that my survey was conducted with 11:36:23AM
24 people actually purchased these various products. 11:36:28AM
25 So they did have prior experience and actually 11:36:30AM

1 Q. And so if a survey-taker was assigned 11:44:51AM
2 value to that statement, hypothetically, because 11:44:55AM
3 the survey-taker thought that coconut oil tastes 11:44:58AM
4 "better than butter on bread, vegetables or 11:45:04AM
5 popcorn," the value associated with taste would be 11:45:08AM
6 part of what's driving the value of the price 11:45:11AM
7 premium determined for that statement correct? 11:45:15AM

8 A. Hypothetical that's true. I think it 11:45:17AM
9 would be useful for me to comment that I did do 11:45:22AM
10 some testing of this, particularly in the in depth 11:45:26AM
11 interviews that I did. Where asked respondents 11:45:29AM
12 about their reactions and understanding of these 11:45:32AM
13 different claims. So I did have information there 11:45:34AM
14 that is not going to lend, itself, to quantitative 11:45:37AM
15 analysis because it's only eight persons that I 11:45:45AM
16 tested my concepts on to design the conjoint 11:45:48AM
17 survey. 11:45:54AM

18 The overwhelming sense I took away from those 11:45:54AM
19 eight interviews is that the consumers I talked to, 11:45:58AM
20 overwhelmingly, interpreted the challenge claims 11:46:04AM
21 and health terms in terms of health. 11:46:07AM

22 I understand your distinction between a taste 11:46:11AM
23 motivation to purchase a product or maybe a taste 11:46:14AM
24 interpretation of the "better than butter" claim 11:46:18AM
25 compared to a health-related interpretation of the 11:46:21AM

1 "better than butter" claim. 11:46:26AM

2 What I can tell you is that the people that I 11:46:29AM

3 talked to when they looked at these claims in 11:46:32AM

4 totality, I did not ask specifically about what did 11:46:35AM

5 you think about this claim or that claim. I talked 11:46:37AM

6 to them about these claims more generally. They 11:46:40AM

7 tend to think of coconut oil as a healthy 11:46:43AM

8 alternative. That's what I took away from that 11:46:46AM

9 small sample. 11:46:49AM

10 Q. And we'll talk about that small sample, 11:46:50AM

11 we'll get to that subject when we cover in depth 11:46:53AM

12 interviews and I appreciate you bringing it up now. 11:46:56AM

13 But we will talk about it more in a bit. 11:46:58AM

14 But, in the conjoint survey, the people who 11:47:00AM

15 respond to that survey did not respond based on to 11:47:07AM

16 provide a meaning as to how they interpreted 11:47:11AM

17 "better than butter on bread, vegetables or 11:47:15AM

18 popcorn;" correct? 11:47:18AM

19 A. And by definition "conjoint survey" does 11:47:19AM

20 not interpret people's understanding or meanings. 11:47:22AM

21 Q. So, for example, it didn't measure if 11:47:24AM

22 someone interpreted that, referring to taste; 11:47:29AM

23 correct? 11:47:32AM

24 A. It measured value. It didn't measure, 11:47:32AM

25 you know, what it is that actually is underlying 11:47:35AM

1 reasons for people to have their values. 11:47:38AM

2 The conjoint survey measures the valuations 11:47:39AM

3 themselves. 11:47:44AM

4 Q. And so it didn't measure whether someone 11:47:44AM

5 considered it "better than butter" because it's 11:47:48AM

6 vegan; right? 11:47:52AM

7 A. That it's vegan? I don't think the word 11:47:53AM

8 "vegan" appears in my survey. 11:47:58AM

9 Q. So it did not attempt to determine 11:48:00AM

10 whether a survey-taker considered it better, 11:48:03AM

11 because it was vegan; correct? 11:48:06AM

12 A. If the respondent had that understanding 11:48:08AM

13 coming into this survey based on their past 11:48:11AM

14 experience of purchasing these brands, then their 11:48:15AM

15 -- the extent to which vegan is important to them, 11:48:19AM

16 would be taken into account by respondents past 11:48:21AM

17 experience in purchasing these brands. 11:48:49AM

18 Q. And the way we take into account is in 11:48:52AM

19 the preferences that were expressed; right? 11:48:55AM

20 A. In the choices made in the survey. 11:48:58AM

21 Q. And those choices were made in the 11:48:59AM

22 survey are what resulted ultimately in the price 11:49:02AM

23 premium percentages; correct? 11:49:06AM

24 A. In combination with the transaction data 11:49:08AM

25 that I talked about earlier and all the other 11:49:10AM

1 Do you agree? 01:35:07PM

2 MR. FITZGERALD: Objection. Outside the 01:35:08PM

3 scope. Calls for expert testimony. May call for a 01:35:09PM

4 legal conclusion. 01:35:12PM

5 THE WITNESS: That's outside my assignment to 01:35:13PM

6 answer those questions. 01:35:16PM

7 MR. COLE: 01:35:17PM

8 Q. So we already established earlier that 01:35:17PM

9 it was also outside your assignment to go a step 01:35:25PM

10 forward and if somebody interpreted the claims as 01:35:28PM

11 meaning "healthier than butter," for example, it 01:35:32PM

12 was outside your assignment to determine what that 01:35:35PM

13 consumer understood "healthier than butter" to 01:35:37PM

14 mean; correct? 01:35:44PM

15 MR. FITZGERALD: Objection. Vague and 01:35:44PM

16 ambiguous. 01:35:44PM

17 THE WITNESS: What I said previously in 01:35:44PM

18 answer to this question was something similar is 01:35:46PM

19 that my survey does not measure perceptions, 01:35:50PM

20 interpretations, and understandings -- therefore my 01:35:55PM

21 data are not useful for measuring those properties. 01:35:57PM

22 MR. COLE: I would like to show you what 01:36:16PM

23 we'll mark as our next Exhibit 518. 01:36:18PM

24 (Exhibit 518 was marked for identification by 01:36:18PM

25 the court reporter and is attached hereto.) 01:36:18PM

1 the same in terms of quality? 02:27:24PM

2 A. No, because brands there. 02:27:27PM

3 So, to the extent that respondents are 02:27:29PM

4 bringing to the survey their experiences with 02:27:32PM

5 brands and actual products, they're perfectly 02:27:34PM

6 allowed to do that. 02:27:38PM

7 Q. And to the extent they're not bringing 02:27:39PM

8 that to the survey would they be able to -- if they 02:27:41PM

9 are not bringing that prior experience to the 02:27:45PM

10 survey would they be able to associate a brand with 02:27:47PM

11 a taste for example? 02:27:50PM

12 A. They are bringing experience. These are 02:27:52PM

13 actual purchasers. 02:27:55PM

14 Q. But not everyone who took the survey was 02:27:56PM

15 a Nutiva purchaser; correct? 02:27:59PM

16 A. Well, everybody who I included in the 02:28:01PM

17 analysis was a Nutiva purchaser. 02:28:03PM

18 Q. And what about the availability of the 02:28:06PM

19 product. They're to assume in the survey that all 02:28:08PM

20 the products -- I think we already covered this. 02:28:13PM

21 But, they are going to assume in the survey that 02:28:15PM

22 all the products were available that they see in 02:28:16PM

23 the choice sets; correct? 02:28:19PM

24 A. That's right. 02:28:20PM

25 Q. And then if there is a market that day, 02:28:21PM

1 they're supposed to be acting as if they're in the 02:28:23PM
2 marketplace, I think you said in the instructions 02:28:25PM
3 wherever they make their purchases. But, in that 02:28:27PM
4 marketplace as they're comparing the products, the 02:28:29PM
5 products of the choice sets are all available; 02:28:32PM
6 correct? 02:28:35PM
7 A. That's correct. 02:28:35PM
8 Q. I understand that in the Nature's Way 02:28:36PM
9 report -- the case, excuse me. In the Nature's Way 02:29:39PM
10 case, you prepared a report which we've looked at 02:29:41PM
11 concerning the conjoint analysis you did in that 02:29:44PM
12 case; correct? 02:29:48PM
13 A. That's correct. 02:29:48PM
14 Q. You haven't testified in that case 02:29:49PM
15 beyond the report; have you? 02:29:51PM
16 A. No, I have not. 02:29:52PM
17 Q. And can you remind me was there any 02:29:53PM
18 case, previous case in which you provided either 02:29:57PM
19 deposition or testimony where you had conducted 02:30:01PM
20 conjoint analysis? 02:30:04PM
21 And I am not asking for a report, but actual 02:30:06PM
22 deposition testimony? 02:30:08PM
23 A. I have not. 02:30:10PM
24 Q. We can look at your report, again, 02:30:11PM
25 Exhibit 513, paragraph 13. About the middle of 02:30:29PM

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1 approach individuals asking if I could have 20 to 02:34:16PM
2 30 minutes of their time. And if they qualify, 02:34:19PM
3 meaning that they actually are past purchasers of 02:34:23PM
4 coconut oil, then I see if they have time and if 02:34:28PM
5 they're willing to talk. And sometimes people say 02:34:30PM
6 yes. Sometimes they say no. A lot of times they 02:34:35PM
7 say no. 02:34:39PM

8 But, I find it just a refreshing river stream 02:34:39PM
9 of people coming in and out of this particular 02:34:43PM
10 Starbucks. And surprisingly enough, a lot of 02:34:46PM
11 people are willing to sit down and just talk about 02:34:49PM
12 this. So, it's not like what happens for a lot of 02:34:52PM
13 concept testing in the U.S. where they rely on 02:34:58PM
14 intercepting individuals in strip malls or shopping 02:35:02PM
15 malls or, you know, the MGM Grand has a big 02:35:06PM
16 intercept capability in Las Vegas, so that's the 02:35:10PM
17 method I used. 02:35:14PM

18 Q. So in this particular -- excuse me. 02:35:15PM

19 When you refer to the in-depth interviews in 02:35:16PM
20 paragraph 15 of your report in this case are those 02:35:20PM
21 the same interviews that you refer to in the Hunter 02:35:22PM
22 versus Nature's Way report? 02:35:27PM

23 A. It's a different exercise. It's another 02:35:28PM
24 group of people, if that's your question. 02:35:32PM

25 Q. It is. 02:35:33PM

1	So you did a separate round of eight	02:35:35PM
2	interviews for this case and you didn't rely on	02:35:37PM
3	just the ones that were done in the Hunters versus	02:35:38PM
4	Nature's Way case?	02:35:42PM

5	A. That's correct. So, they're independent	02:35:43PM
6	sessions I did.	02:35:45PM

7	Q. And in this case was it done at this	02:35:46PM
8	Starbucks here in Redwood City?	02:35:48PM

9 A. It was. 02:35:50PM

10 Q. And did you record any information that 02:35:51PM

11 you obtained during the interviews? 02:35:53PM

12 A. No, I did not. 02:35:55PM

13 Q. And so you asked questions and just 02:35:56PM

14 absorbed it into your mind and let it sit there? 02:36:00PM

[illegible]

17 Q. You didn't take notes? 02:36:08PM

18 A. No, I did not. 02:36:10PM

19 Q. And you said that these eight in-depth 02:36:11PM
20 interviews which there were no notes, they weren't 02:36:16PM
21 recorded, I assume? 02:36:20PM

22 A. No. 02:36:22PM

23	Q. And they were -- you qualified by saying	02:36:22PM
24	these aren't considered random because you -- you	02:36:25PM
25	just -- the sample size and the way you went about	02:36:29PM

1 it, doesn't -- isn't something will allow you to 02:36:31PM
2 say it's a fair cross-section of the consumers; 02:36:35PM
3 correct? 02:36:37PM
4 A. Right. It is never intended as a 02:36:38PM
5 statistical study. So, these are just qualitative 02:36:40PM
6 in-depth interviews to give me deep background 02:36:43PM
7 information I needed to design the study. 02:36:43PM
8 Q. And the qualitative interviews that you 02:36:46PM
9 did, there were eight. 02:36:52PM
10 A. There were eight of them. 02:36:55PM
11 Q. And is there a reason that you chose 02:36:56PM
12 eight? 02:36:59PM
13 A. Habit. Really just habit. 02:36:59PM
14 I try to get at least eight when I do this. 02:37:01PM
15 Sometimes I'll do just six. But I always try to go 02:37:05PM
16 for eight. 02:37:09PM
17 Q. And how did the result of those eight 02:37:09PM
18 interviews impact the design of the service 02:37:21PM
19 questionnaire? 02:37:24PM
20 A. I think, principally, a lot of those 02:37:25PM
21 confirmatory from what I did in Nature's Way. I 02:37:29PM
22 think it's -- I just really believe it's important 02:37:33PM
23 to go in-depth interviews and not skip the step 02:37:37PM
24 regardless of the study. 02:37:41PM
25 In this case doing a study on a very similar 02:37:43PM

1 topic. 02:37:47PM

2 My own opinion is the qualitative in this 02:37:47PM

3 particular project didn't have a big impact on the 02:37:51PM

4 survey because I had already done Nature's Way. 02:37:54PM

5 Nonetheless, I feel it's very important to stick to 02:37:57PM

6 the protocol and make sure I have the right 02:38:01PM

7 attributes. It's important and it's possible that 02:38:03PM

8 I would have met a different subset of individuals 02:38:05PM

9 this time around who would give me a different 02:38:09PM

10 prism through which I can look at this product and 02:38:12PM

11 maybe if there is an attribute I should have 02:38:16PM

12 included that I did not include in Nature's Way. 02:38:17PM

13 So I wanted to be open-minded about that. 02:38:19PM

14 But, I did collect information at least in 02:38:22PM

15 terms of the conversations I had about what I call 02:38:25PM

16 people's purchase journeys or consumer journeys. 02:38:29PM

17 So I'm really encouraging people to talk about: 02:38:32PM

18 Why I bought these products? Where did they buy 02:38:36PM

19 them? And specifically talk about, you know, the 02:38:39PM

20 pricing. Their familiarity with pricing, what they 02:38:43PM

21 usually pay for. Because I am always 02:38:47PM

22 double-checking against the levels -- the levels, 02:38:49PM

23 of course, you know, within the attribute, the 02:38:53PM

24 levels such as pricing. And I want to make sure 02:38:55PM

25 that I'm basically designing the survey in a way 02:38:58PM

1 respondents, and like voting in an election booth, 02:55:46PM
2 they're voting for Candy A, B, or C and they are 02:55:51PM
3 doing it 12 times per survey. 02:55:55PM

4 And so I'm representing the product in these 02:55:57PM
5 profiles. So, it's an obvious truism that I'm not 02:55:59PM
6 presenting the entire label, which is the 02:56:04PM
7 appropriate thing to do for a conjoint survey. 02:56:06PM

8 So, I am not sure if it's a responsive 02:56:09PM
9 answer, but... 02:56:12PM

10 Q. No, I think it's responsive. Thank you. 02:56:13PM

11 It's just that you referred back earlier to 02:56:15PM
12 when: A few moments ago referred earlier to "while 02:56:21PM
13 you might not have had five claims, for example, 02:56:25PM
14 together all at once, you had enough different 02:56:27PM
15 combinations that you felt some that some 02:56:27PM
16 conclusions could be drawn from the survey with 02:56:29PM
17 respect to all of the challenge claims. 02:56:31PM

18 Do you recall that testimony? 02:56:34PM

19 A. Yes, I do. 02:56:35PM

20 Q. And I guess -- I just wanted to make 02:56:36PM
21 sure before we depart on another subject. That in 02:56:38PM
22 your own mind, you are not equating the five 02:56:42PM
23 challenge claims to the label as a whole; correct? 02:56:44PM

24 A. I think no reasonable person would 02:56:47PM
25 equate five statements, even the challenge claims, 02:56:53PM

1 as being the reality of the entire label as a 02:56:57PM
2 whole. 02:57:00PM
3 Q. Let's go to page 18 of your report. 02:57:14PM
4 Excuse me, paragraph 18, which is again Exhibit 02:57:16PM
5 513. 02:57:21PM
6 MR. FITZGERALD: Bill, would you mind if I 02:57:37PM
7 take a quick restroom break? 02:57:39PM
8 MR. COLE: Absolutely. That's fine. 02:57:40PM
9 THE VIDEOGRAPHER: Going off the record. 02:57:41PM
10 Time is 02:57:42PM
11 2:57 p.m. 02:57:42PM
12 (Whereupon a break was had) 03:04:58PM
13 THE VIDEOGRAPHER: Back on the record. 03:04:58PM
14 The time is 3:04 p.m. 03:05:00PM
15 MR. COLE: 03:05:03PM
16 Q. Dr. Dennis, let's go back to your 03:05:03PM
17 report, Exhibit 513. And let's go to paragraph 42 03:05:07PM
18 on page 22. 03:05:15PM
19 I want to look at the table actually, 03:05:35PM
20 probably the next page, on page 22. Do you see 03:05:38PM
21 that table? 03:05:41PM
22 A. I do. 03:05:41PM
23 Q. So, if we look down at the last row of 03:05:42PM
24 the table, the challenge labels are 100 percent 03:05:48PM
25 less cholesterol butter plus "Superfood;" correct? 03:05:52PM

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1 interpret that that that product had it not had 03:09:38PM
2 those three claims would, in fact, have been priced 03:09:42PM
3 in the marketplace at 50 percent less than it was? 03:09:45PM
4 MR. FITZGERALD: Objection. Incomplete 03:09:50PM
5 hypothetical. 03:09:50PM
6 THE WITNESS: Well, I mean, obviously, I 03:09:52PM
7 can't predict exactly how Nutiva's management would 03:09:53PM
8 react to this information. So, if demand falls 03:09:58PM
9 tremendously because these claims were being 03:10:01PM
10 removed from the package, then Nutiva had some 03:10:04PM
11 business decisions to make. 03:10:08PM
12 They could potentially not make the product 03:10:09PM
13 anymore. 03:10:11PM
14 They could pull the product off the shelf. 03:10:12PM
15 They could reduce the price substantially. 03:10:15PM
16 They could be stubborn about it and keep the 03:10:18PM
17 price point higher and see market share decline. 03:10:20PM
18 So, there are a lot of different business 03:10:24PM
19 decisions and options in front of the Nutiva 03:10:27PM
20 management in that scenario. 03:10:31PM
21 MR. COLE: 03:10:31PM
22 Q. And recognizing that, which I think is 03:10:32PM
23 common sense, recognizing that, can you render the 03:10:38PM
24 opinion that if the lower bound premium, of let's 03:10:42PM
25 say three of the challenge claims together was 50 03:10:46PM

1 percent, can you render the opinion that the market 03:10:49PM
2 price of that product would have been 03:10:51PM
3 50 percent lower if those three claims were not on 03:10:55PM
4 it when that product was sold? 03:10:58PM
5 A. I think I explained it's difficult to 03:11:00PM
6 predict what the market price would be. Because 03:11:03PM
7 that's the dance between consumers sellers. 03:11:06PM
8 What I can rely on and attest to is the 03:11:09PM
9 survey which is making your prediction of what the 03:11:12PM
10 consumer preferences and utilities would be in that 03:11:15PM
11 scenario. 03:11:18PM
12 Q. Let's talk about the population and 03:11:19PM
13 sample size in your work in this case. 03:12:13PM
14 You determined that the study's target 03:12:16PM
15 population were U.S. adult residents who were 03:12:20PM
16 coconut oil purchasers; is that right? 03:12:25PM
17 A. May I examine my report, briefly? 03:12:26PM
18 Q. Yes. 03:12:29PM
19 A. Thank you. 03:12:30PM
20 Yes, I see my definition in paragraph 14. 03:12:35PM
21 Q. And if that was the target -- the 03:12:37PM
22 relevant population at issue, why did some of the 03:12:51PM
23 market simulator results -- why were some of the 03:12:55PM
24 market simulator results based on a subset of 03:13:01PM
25 Nutiva purchasers? 03:13:05PM

1 I, the undersigned, a Certified Shorthand Reporter of
2 the State of California, do hereby certify:

3 That the foregoing proceedings were taken before me
4 at the time and place herein set forth; that any witnesses in
5 the foregoing proceedings, prior to testifying, were
6 administered an oath; that a record of the proceedings was
7 made by me using machine shorthand which was thereafter
8 transcribed under my direction; that the foregoing transcript
9 is a true record of the testimony given.

10 Further, that if the foregoing pertains to the
11 original transcript of a deposition in a Federal Case, before
12 completion of the proceedings, review of the transcript []
13 was [] was not requested.

14 I further certify I am neither financially interested
15 in the action nor a relative or employee of any attorney or
16 any party to this action.

17 IN WITNESS WHEREOF, I have this date subscribed my
18 name.

19 Dated: September 22, 2017

20
21 
22

23 LISA R. TOW

24 CSR No. 6629